Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma	CC Docket No. 97-121

To: The Commission

OPPOSITION OF SOUTHWESTERN BELL TO ALTS' MOTION TO DISMISS AND REQUEST FOR SANCTIONS

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EXECUTIVE SUMMARY

Southwestern Bell owes ALTS a debt of gratitude for laying bare the sort of tactics that opponents are using in an effort to keep Bell companies out of long distance. ALTS ignores the facts, in favor of publicity-hounding and falsehoods. ALTS ignores the law, in favor of an argument that competitors decide when Bell companies will be allowed to apply for interLATA relief. ALTS' motion simply could not have been filed in good faith.

Every allegation of misconduct leveled by ALTS is false. The facts set out in Southwestern Bell's application regarding Brooks Fiber's provision of local service are taken directly from Brooks Fiber's own filings and statements before the Oklahoma Corporation Commission ("OCC"). Supporting materials were supplied to the Commission as attachments to Southwestern Bell's application. They confirm that Brooks Fiber is a qualifying, facilities-based competing provider of business and residential service and that Southwestern Bell has satisfied all requirements of section 271(c)(1), as the OCC recently determined after its independent review.

Flatly contradicting Brooks Fiber's statements to the OCC, and ignoring Brooks Fiber's effective tariffs offering business and residential service in Oklahoma, ALTS contends that Brooks Fiber is not a "competing provide[r]" of business and residential service under subsection 271(c)(1)(A). We believe that ALTS is wrong, and Brooks Fiber is a qualifying provider under subsection (A). The OCC has agreed. But if ALTS is correct and Brooks Fiber is not a qualifying provider under subsection (A), then Southwestern Bell is entitled to rely on its effective statement of terms and conditions to file under subsection 271(c)(1)(B), because no qualified competing provider of telephone exchange service has requested access and interconnection in Oklahoma.

At bottom, ALTS seeks to overturn Congress' decision that full interLATA competition should not be hostage to the business decisions of the Bell companies' competitors. Having heard the arguments on both sides, lawmakers rejected attempts to make some amount of actual local competition a prerequisite to interLATA entry under section 271. They determined that Bell companies should have an opportunity to compete in long distance when competitors have an opportunity to compete in providing local telephone services, as measured by the Bell company's compliance with the competitive checklist.

Congress thus allowed Bell companies to file under section 271 so long as they can show that they have satisfied the checklist requirements through an approved interconnection agreement with a facilities-based carrier and/or a statement of generally available terms and conditions. By allowing a Bell company to satisfy the checklist through agreement(s) where there is facilities-based local competition and through a statement where there is not, Congress ensured that companies such as Brooks Fiber cannot block interLATA entry by tailoring their own plans for entering the local telephone business. Oklahoma consumers otherwise would have the worst of both worlds. They would be denied the benefits of long distance competition solely because competitors have decided not to offer a particular type of local competition.

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SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance (collectively, "Southwestern Bell") oppose the Motion to Dismiss and Request for Sanctions filed by the Association for Local Telecommunications Services ("ALTS"). ALTS' pleading is a malicious effort to score points through press releases, and to short-circuit the Commission's responsible fulfillment of its duties under section 271(d) of the Communications Act. At the same time, it is an effort to re-open a fundamental issue Congress resolved a year ago: whether a Bell company's actions to facilitate entry into the local exchange, or its competitors' decisions actually to enter the local market, should trigger interLATA relief. The Commission should emphatically reject ALTS' attempt to block implementation of Congress' policy choice through the section 271 process. It should move forward to approval of Southwestern Bell's application for interLATA relief in Oklahoma.

I. SOUTHWESTERN BELL FULLY AND ACCURATELY SET OUT THE FACTS RELATING TO ITS SATISFACTION OF SECTION 271(C)(1)

To justify press releases claiming "another Ameritech," ALTS has misrepresented Brooks Fiber's services in Oklahoma and the contents of Southwestern Bell's application. In announcing the filing of its Motion, ALTS accused Southwestern Bell of "completely and intentionally misrespresent[ing] the facts by claiming that Brooks was providing residential

service."[1] In its Motion, ALTS accuses Southwestern Bell of "a mispresentation to the Commission."[2] These accusations are baseless, as ALTS well knows.

The undisputed facts are fully set out in Southwestern Bell's Brief.[3] Each and every one is supported by Brooks Fiber's own filings with the OCC, which Southwestern Bell submitted to this Commission as part of its application. In the Brief, Southwestern Bell reported that:

- By Brooks Fiber's own admission, Brooks Fiber is authorized in Oklahoma to provide telephone exchange service to business and residential customers.[4]
- According to Brooks Fiber's own tariffs, Brooks Fiber "undertakes to furnish" local exchange service that provides both business and residential customers "with the ability to connect to the [Brooks Fiber] switching network."[5]

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[1] Association for Local Telecommunications Services Files Motion Urging FCC to Immediately Dismiss SBC Long Distance Bid at 2 (Apr. 23, 1997) (Ex. 1 hereto).

[2] Motion to Dismiss and Request for Sanctions by the Association for Local Telecommunications Services at 1 (filed Apr. 23, 1997).

[3] Brief in Support of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma (filed Apr. 11, 1997) ("Brief").

[4] Brief at 9 (quoting Initial Comments of Brooks Fiber Communications of Oklahoma, Inc. and Brooks Fiber Communications of Tulsa, Inc., at 1 ("Brooks Initial Comments") (Ex. 2 hereto and appended to Brief at App. IV, Tab 23)).

[5] Brooks Fiber Communications of Tulsa, Inc. and Brooks Fiber Communications of Oklahoma, Inc., O.C.C. Tariff No. 2 §§ 2.1.1, 4.1 (excerpted as Ex. 3 hereto; full versions appended to Brief at App. Vol. II, Tab 3); see Brief at 10.

- By Brooks Fiber's own admission, Brooks Fiber "is currently providing switched local exchange service" to business customers, including customers served entirely over its own fiber-optic networks in Tulsa and Oklahoma City.[6]
- By Brooks Fiber's own admission, Brooks Fiber "is currently providing" local exchange service to "3 residential customers in Tulsa and 1 residential customer in Oklahoma City" on a resale basis.[7]

There can be no misrepresentation by Southwestern Bell when the application accurately set out the available facts, with supporting documentation. It is ALTS that takes liberties. ALTS asserts that "Brooks has not offered and is not offering any residential service in Oklahoma." Motion at 3 (emphasis changed). ALTS further claims that Brooks is not "providing service to residential customers." Id. at 4. Yet Brooks Fiber represented, in undisputed materials attached to ALTS' own motion, that "Brooks presently is providing local telephone service to three (3) residential customers, on a test basis, in Tulsa, and one (1) residential customer, on a test basis, in Oklahoma City."[8] Brooks Fiber plainly is providing residential service under its approved tariffs, as Southwestern Bell stated but ALTS directly denies.

Even if Brooks Fiber's "test" customers are employees of the company, they still take their local telephone service from Brooks as an alternative to Southwestern Bell. Brooks Fiber, for one, seems to recognize the irrelevance of its customers' employment, for it saw no need to

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[6] Brief at 9, 11; Brooks Initial Comments at 2.

[7] Brooks Initial Comments at 2; see Brief at 9, 11.

[8] Attachment A to Letter from Edward J. Cadieux to Martin E. Grambow (Mar. 4, 1997).

mention this fact when answering Southwestern Bell's request for pertinent information on March 4. Id. This newly furnished information does not affect the status of Southwestern Bell's application and it could not possibly support ALTS' claim of "intentional misrepresentation" in the application.

ALTS and Southwestern Bell disagree on the legal question whether the local telephone service Brooks Fiber concededly provides is sufficient to make Brooks Fiber a qualifying, competing provider under subsection 271(c)(1)(A). We show below that Brooks Fiber's service is sufficient; even if it were not, Southwestern Bell could still secure interLATA relief under subsection 271(c)(1)(B). There is, however, no relevant dispute over the facts of Brooks Fiber's service, which were accurately set out in Southwestern Bell's Brief.

ALTS has leveled a very serious charge against Southwestern Bell — one that ALTS knew to be false, based on the materials cited by both Southwestern Bell and ALTS. The Commission should take strong steps to stop ALTS and other parties from filing such abusive pleadings in their efforts to grab the spotlight and defeat section 271 applications through the press.[9]

II. CONGRESS REJECTED ALTS' VIEW THAT COMPETITORS' BUSINESS DECISIONS DETERMINE THE TIMING OF SECTION 271 RELIEF

In addition to being factually unsupported, ALTS' motion is legally unsound. ALTS suggests that Brooks Fiber's decision when and how to roll-out local services in Oklahoma is dispositive of Southwestern Bell's ability to enter the interLATA business. Congress directly

[9] Such steps are especially warranted given that inflammatory accusations almost always attract more attention than detailed refutations.

rejected that approach. It did not want consumers' ability to benefit from greater interLATA competition to depend upon the business decisions of local competitors. Rather, Congress intended that Bell companies would have an opportunity to apply for interLATA entry after a reasonable period of time, regardless of competitors' strategies.

That is not to say that approval of interLATA applications was guaranteed. Rather, Bell companies are assured of the ability to secure interLATA authority only if local markets are open in accordance with the checklist; if the company abides by structural separation requirements; and if interLATA entry would be consistent with the public interest. There can be no legitimate basis for denying a 271 application under these circumstances.

During debate on the 1996 Act, the incumbent long distance carriers argued — as they still do — that Bell companies should be forbidden from offering in-region, interLATA services until they face some threshold level of actual local competition. For their part, the Bell companies argued that once legal barriers to entry have been removed in the local exchange, legal barriers to interLATA entry necessarily should fall as well.

Congress accepted neither of these opposing positions in toto. Legislators took the word of cable companies and others that they would very quickly enter the local market as facilities-based providers if legal and economic barriers were lowered, and they wanted to be sure that this

could occur.[10] But they also determined that the consumer benefits of opening interLATA markets should not be delayed indefinitely if this competition failed to materialize.[11]

Accordingly, to promote rapid entry in both local and long distance markets, Congress rejected proposals that would have tied Bell company interLATA relief to measurements of local competition. For example, Senator Hollings abandoned his idea of an "actual and demonstrable competition" requirement after he determined that it "was not going to go anywhere."[12] Likewise, the Senate defeated Senator Kerrey's proposal that section 271(c)(1) be changed to provide that "a Bell operating company may provide interLATA services in accordance with this section only if that company has reached interconnection agreements under section 251 . . . with telecommunications carriers capable of providing a substantial number of business and residential customers with" service.[13] The House similarly rejected an amendment that would have required competitors to offer local services to 10 percent of customers as a prerequisite to Bell company interLATA entry.[14]

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[10] S. Conf. Rep. No. 230, 104th Cong., 1st Sess. 148 (1996) ("Conference Report"). In January 1995, for instance, House Telecommunications Subcommittee Chairman Fields was assured by cable industry executives that cable companies would offer residential telephony. 142 Cong. Rec. H1149 (daily ed. Feb. 1, 1996).

[11] See, e.g., 141 Cong. Rec. S686-87 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler) ("This bill attempts to get everybody into everybody else's business and let in new entrants. . . . It will lower prices on long-distance calls through competition.").

[12] 141 Cong. Rec. S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings).

[13] 141 Cong. Rec. S8319, S8326 (daily ed. June 14, 1995).

[14] See 141 Cong. Rec. H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn).

While it rejected approaches that would make Bell company entry dependent upon some "metric" test of local competition, Congress did not embrace the notion that Bell companies should be allowed into long distance regardless of the state of their local markets. Instead, Congress adopted the "competitive checklist" of section 271(c)(2)(B) "as a compromise between the 'actual and demonstrable' and [AT&T consent decree] tests . . . and the concept of a date certain standard." The idea, Chairman Pressler explained, was "to find a way in this complex telecommunications arena to have a test of when markets are open."[15]

Under the Act, therefore, a Bell company may apply for interLATA relief as soon as it can demonstrate that its local markets are open to competition. This test is met: if (1) a Bell company has state-approved interconnection agreement(s); under which (2) it is providing access and interconnection that includes each of the checklist items to "one or more unaffiliated competing providers of telephone exchange service" to business and residential subscribers; and (3) the competing provider(s) "offe[r]" telephone exchange service "exclusively . . . or predominantly over their own telephone exchange service facilities." § 271(c)(1)(A) & (c)(2). But if no competing provider described in subsection 271(c)(1)(A) has requested interconnection and access under sections 251 and 252, the Bell company may meet the test if it is offering access and interconnection that includes each of the checklist items pursuant to an approved or effective statement of generally available terms and conditions. § 271(c)(1)(B) & (c)(2).

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[15] 141 Cong. Rec. S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler); see 141 Cong. Rec. S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings) (discussing abandonment of "actual and demonstrable competition" approach in favor of checklist).

Congress included the "B Track" option precisely "to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market." Conference Report at 148. When a Bell company takes the necessary steps to satisfy the checklist requirements, it can no longer be kept out of the long distance business for reasons that are beyond its control. Competitors have the opportunity to enter the local market because both legal and economic obstacles have been lowered. Likewise, the Bell company has the opportunity to provide interLATA services in compliance with the statutory safeguards and consistent with the public interest.

III. SOUTHWESTERN BELL IS ELIGIBLE FOR INTERLATA RELIEF IN OKLAHOMA

Ignoring this statutory structure, ALTS maintains that opponents of Bell company applications can have their cake and eat it too. ALTS takes two directly contradictory positions: that Brooks Fiber is not a qualifying facilities-based carrier for purposes of allowing Southwestern Bell's interLATA entry under subsection (A) and that Brooks Fiber is "such provider" for purposes of blocking Southwestern Bell's interLATA entry under subsection (B).

Both positions cannot be correct. Subsection (A) asks whether the Bell company "is providing access and interconnection" to a specific type of "competing provide[r]." Subsection (B) asks whether "such provider has requested the interconnection and access described in subparagraph (A)" by a particular time. Southwestern Bell believes that it is has satisfied all requirements of section 271(c) pursuant to subsection (A). The OCC so found on April 25 after reviewing Southwestern Bell's application and the submissions of Brooks Fiber, AT&T, Sprint,

MCI, the Oklahoma Attorney General, and other interested parties.[16] But, if the Commission were to hold that Brooks Fiber is not a qualifying competing provider under subsection (A), then it would have to find that Southwestern Bell has not received any interconnection request from "such provider" and is entitled to file under the plain language of subsection (B).

A. Brooks Fiber Is a Qualifying Competing Provider Under Subsection (A)

ALTS does not dispute that Southwestern Bell "is providing access and interconnection to its network facilities for the network facilities" of Brooks Fiber, that Brooks is an unaffiliated provider of telephone exchange service, or that the Southwestern Bell/Brooks Fiber interconnection agreement "ha[s] been approved under section 252." § 271(c)(1)(A). ALTS focuses instead upon whether Brooks Fiber meets the "residential and business subscribers" and "facilities-based" requirements of subsection 271(c)(1)(A).

The first issue is whether Brooks Fiber is a "competing provide[r]" of local service "to residential and business subscribers." Id. As explained in Part I, Brooks Fiber acknowledged before the OCC and informed Southwestern Bell that it provides local telephone service to 20 business and 4 residential customers. Subsection 271(c)(1)(A) places no floor on the number of customers that must actually be served. Congress expressly rejected any such litmus test of the extent of local competition. See Part II, supra. That Brooks' residential customers are employees served on a "test" basis also is irrelevant to Southwestern Bell's application. Section 271 makes no distinctions based upon the end user's employment, the label a carrier attaches to

[16] Southwestern Bell included the record of the OCC's investigation, through early April, as Appendix Volume IV to its application. Southwestern Bell and/or the OCC will supplement the record with the OCC's final decision and other recent materials when they are available.

its local service, or the pricing of the service. Because Brooks Fiber serves both businesses and residences in competition with Southwestern Bell, it satisfies the "residential and business subscribers" requirement.

Brooks Fiber's local service must, in addition, "be offered . . . either exclusively over [Brooks Fiber's] own telephone exchange service facilities or predominantly over [its] own telephone exchange service facilities in combination with the resale of the telecommunications services of" Southwestern Bell. § 271(c)(1)(A). Brooks Fiber's state tariffs hold out facilities-based residential service. See Part I, supra. Furthermore, Brooks obtained a certificate of public convenience and necessity to provide local service in Oklahoma by representing that it would offer service to residential customers in its service areas, and not just cream-skim profitable business customers from Southwestern Bell. The OCC has indicated its concern about "cherry picking" by new local competitors, and adopted rules in Cause No. RM 950000019 to prevent this practice.[17] Accordingly, Brooks Fiber's witness testified that: "As we get into offering switch services, we are going to offer service to residential customers. . . . [W]e certainly are going to offer residential service throughout the originating territories that I have described in my testimony."[18] The OCC staff then sought to clarify Brooks Fiber's commitment to serving residential customers in Oklahoma:

> Q. So basically you are confirming that . . . you also intend to offer [service] to residential and certainly would not limit your services or preclude residential

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[17] Transcript of Testimony, Cause No. RM 950000019 at 32-33 (Mar. 7, 1996) (statement of Chairman Graves) (Ex. 4 hereto).

[18] Transcript of Proceedings, Cause No. PUD 960000102 at 35 (July 15, 1996) (testimony of Mr. Cadieux) (Ex. 5 hereto).

customers from partaking of any services you might make available to business customers, for example?

A. That's correct. I mean there are certain services by the nature of either their economic or technical, you know, characteristics that are not going to be — that are going to be attract[ive] to business customers and not residential. . . . But with that qualification, the answer is yes.

Q. In other words, . . . you would offer your services in a non-discriminatory fashion.

A. That's correct.[19]

Having secured certification, Brooks Fiber now says that its tariffs "d[o]n't require [Brooks Fiber] to hold [residential service] out immediately at this point" and that it will connect only business customers to its fiber optic network, even if residential users ask for the same connections as businesses can buy.[20] Whatever the reason for this business decision, it highlights why Congress did not make interLATA competition dependent upon the uncertain promises or fluid decisions of competitors.

Brooks Fiber suggests that it cannot provide residential service through unbundled loops because of difficulties in obtaining collocation from Southwestern Bell and the absence of "final" prices.[21] Brooks Fiber has never sought to buy unbundled loops from Southwestern Bell, even though they are available through its interconnection agreement at negotiated prices. See Brief at 22-23. The OCC has determined that every checklist item is available to Brooks Fiber and other

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[19] Id. at 35-36.

[20] Transcript of Proceedings, Cause No. PUD 970000064 at 68-70 (Apr. 14, 1997) (testimony of Mr. Cadieux) (Ex. 6 hereto).

[21] Affidavit of John C. Shapleigh ¶¶ 3, 6 (attached to ALTS Motion).

competitors in Oklahoma consistent with the checklist. Moreover, while Brooks Fiber cites collocation as a sticking point, Southwestern Bell has implemented virtual collocation with Brooks[22] and has turned four physical collocation "cages" over to Brooks for installation of its equipment.[23] Finally, issues regarding collocation and unbundled loops could not afford Brooks Fiber any excuse for failing to furnish facilities-based service to residential customers (especially those in multiple unit dwellings) along the route of Brooks' existing network or by using the same T-1 arrangements as businesses. That is Brooks Fiber's own choice, and one that should not determine whether Oklahomans will benefit from greater long distance competition.

The service actually furnished by Brooks Fiber confirms Brooks Fiber's status as a qualifying "A Track" competitor. Brooks Fiber by its own account serves at least 8 "on-net" business customers exclusively over its fiber rings and switches. Brooks Initial Comments at 2. Eleven additional business customers are served using Brooks Fiber's own switches and fiber rings in combination with T-1 facilities obtained from Southwestern Bell but dedicated exclusively to Brooks Fiber's use. See id. One business customer and 4 residential customers are served on a resale basis. Id.

As explained in Southwestern Bell's Brief, all of the 8 "on-net" customers as well as the 11 customers served partially over T-1 facilities are served exclusively over Brooks Fiber's

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[22] Brooks acknowledges that virtual collocation arrangements with Southwestern Bell are in place in Oklahoma. While Brooks says that these arrangements are insufficient to provide access to unbundled loops due to its network configuration and "economic feasibility," Brooks Initial Comments at 3 n.6, these limitations are not imposed by Southwestern Bell and do not excuse Brooks from its obligation to serve residences in Oklahoma. See Affidavit of William C. Deere (Ex. 7 hereto); see Ex. 4 hereto (statement of Chairman Graves).

[23] Affidavit of Deanna Sheffield (Ex. 8 hereto).

"own" facilities for purposes of section 271(c)(1), because the T-1's are dedicated to Brooks Fiber's use. See Brief at 11-12. Under any plausible interpretation of the statute, however, Brooks Fiber certainly serves these customers predominantly over its own facilities. All these customers are served using Brooks Fiber's switches and can place calls over Brooks Fiber's fiber rings. The dedicated T-1 connections could not be "predominant," for they comprise only a portion — roughly speaking, a third — of the facilities used to serve less than 60 percent of Brooks' facilities-based customers. Id.

Brooks Fiber offers "exclusively" or "predominantly" facilities-based service even when the small minority of 5 resale customers is considered. It would make no sense to disqualify a carrier with its own facilities from treatment as a qualifying competitor simply because of its business decision to offer service as a local reseller. Such a rule would, for example, allow Bell company interLATA entry when a competitor served 1,000 customers over its own network, but not if the same local competitor then signed up an additional 2,000 resale customers. Just as inappropriately, it would allow competitors to block interLATA entry by serving their local customers through resale instead of on a facilities basis.

B. If Brooks Fiber Is Not a Qualifying Carrier Under Subsection (A), Southwestern Bell May File Under Subsection (B)

Southwestern Bell's application does not, however, depend upon whether Brooks Fiber meets the criteria of subsection (A). Because Congress did not give competitors the keys to Bell company interLATA entry, Brooks Fiber's business strategy cannot prevent Southwestern Bell from qualifying on the basis of its effective statement of terms and conditions under subsection (B), if not under subsection (A). If ALTS' argument that Brooks Fiber is not offering residential

service is accepted and Brooks Fiber is found not to be a qualifying carrier under (A), that same argument would lead directly to the conclusion that Track B is open to Southwestern Bell in Oklahoma.

In an effort to delay Southwestern Bell's interLATA entry indefinitely, ALTS argues that subsection (A) is the only real "track" to interLATA relief. Reliance on Track B, it says, is foreclosed by a request from anyone for interconnection and access, regardless of whether the requester is a qualifying provider described in subsection (A). ALTS Motion at 2, 4-5. ALTS simply ignores the statutory qualification that the B Track is potentially available, after December 8, 1996, unless "such provider has requested the access and interconnection described in subparagraph (A)" within the specified time. § 271(c)(1)(B) (emphasis added). This language fulfills Congress' intent that a Bell company not be prevented from offering interLATA service "simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market."[24]

Representatives Tauzin and Hastert, among others, confirmed during consideration of the Act that "[s]ubparagraph (B) uses the words 'such provider' to refer back to the exclusively or predominantly facilities based [local service] provider described in subparagraph (A)."[25]

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[24] Conference Report at 148 (emphasis added); see id. ("The conference agreement stipulates that a BOC may seek entry under new section 271(c)(1)(B) at any time following 10 months after the date of enactment, provided no qualifying facilities based competitor has requested access and interconnection under new section 251 by the date that is 3 months prior to the date the BOC seeks interLATA authorization.") (emphasis added).

[25] 141 Cong. Rec. H8425, H8458 (daily ed. Aug. 4, 1995) (statement of Rep. Tauzin); see 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert) ("Section 271(c)(1)(B) provides that a BOC may petition the FCC for this in-region authority if it has . . . not received . . . any request for access and interconnection from a facilities-based carrier that

Representative Tauzin even addressed the precise situation alleged by ALTS here, saying that Track B is available when "no competing provider of telephone exchange service with its own facilities or predominantly its own has requested access and interconnection," as well as when "a competing provider of telephone exchange service requests access to serve only business customers." Id.

ALTS makes much of the "safety-valve" provision of subsection 271(c)(1)(B), suggesting that it is the only way a Bell company can ever make use of the B Track. ALTS Motion at 4-5. The final sentence of subsection (B) ensures that a competing provider that is a fully qualifying carrier under subsection (A) cannot foreclose interLATA entry by requesting, but then failing to negotiate or implement, an agreement pursuant to sections 251 and 252. Congress did not, however, intend that local competitors' bad faith in negotiating and implementing agreements would be the only situation in which B Track entry would be possible. The Conference Report does not even mention this safety-value provision when describing subsection (B). Furthermore, under ALTS' view, a Bell company apparently would have to show that every competitor that has requested interconnection is acting in bad faith. This would be an impossible task in many states, since new requests for interconnection are received on an ongoing basis.

ALTS attempts to defend its tortured construction of section 271(c)(1) with the policy argument that Congress had a preference for A Track entry over B Track entry, because a facilities-based competitor will have entered the market. ALTS Motion at 5-8. This claim rests on still more sleight-of-hand by ALTS, which maintained before the United States Court of

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meets the criteria in section 271(c)(1)(A).") (emphasis added).

Appeals for the Eighth Circuit that Congress did not have a bias toward facilities-based local competition.[26]

The "B" avenue to interLATA entry, like the A Track, ensures that barriers to local competition have been removed. Where a Bell company relies upon a statement of generally available terms and conditions, by definition its terms are available to all new entrants throughout the State. Those terms must satisfy the checklist, which is Congress' "test of when local markets are open." 141 Cong. Rec. S8195. If Congress nevertheless had a preference for entry through the A Track, it was fully realized by preventing Bell companies from relying upon subsection (B) for ten months after passage of the Act. Congress determined that once this time had passed, Bell companies and the public should no longer be denied the benefits of increased long distance competition while carriers decide whether or not to deploy local networks and commence service.[27]

Some opponents may argue that Congress could not have meant the definition of a qualifying provider set out in subsection (A) to apply to requesting providers in subsection (B), because any facilities-based local service provider must already have interconnected with the Bell company under section 251. That is wrong. Congress was aware that, in various markets throughout the country, cable companies and competitive access providers had negotiated interconnection agreements with incumbent LECs prior to the 1996 Act. The conferees noted

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[26] Joint Brief of Intervenors in Support of the FCC at 94-95, Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. filed Dec. 23, 1996).

[27] See Conference Report at 148-49. Congress apparently picked 10 months as the appropriate waiting period so that potential facilities-based competitors would have the benefit of the FCC's rules implementing portions of section 251. Id.

one example, an agreement between New York Telephone and Cablevision, in discussing section 271(c)(1).[28] Legislators expected that where such agreements existed, the new entrant would formally request interconnection under the Act and secure state approval of the existing agreement or a new one pursuant to section 252, thereby allowing "immediate" interLATA entry by the Bell company under the A Track.[29]

Likewise, a facilities-based competitor may be providing limited types of local service to business and residential customers completely over its own network, before making an interconnection request under section 251. That request would come from a qualifying "competing provide[r]" that meets the test of subsection (A). Finally, a carrier's prior interconnection request may become a qualifying request under subsection 271(c)(1)(B) once the carrier starts to provide qualifying, facilities-based service pursuant to its interconnection agreement. In that case, the carrier satisfies subsection (A)'s test for a qualifying competing provider and it "has requested . . . access and interconnection." § 271(c)(1)(B).

It should be noted that in these examples the Bell company is not immediately precluded from filing under the B Track. Rather, Congress ensured that competitors could not strategically block interLATA entry by timing their interconnection requests or introduction of their local services. To this end, section 271(c)(1)(B) states that if no qualifying competing provider has requested access and interconnection at least three months before the Bell company files its application — enough time to secure approval of a statement of terms and conditions — then the

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[28] Conference Report at 148.

[29] 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux).

Bell company may rely upon the B Track. This provision is relevant to Southwestern Bell's application, for Southwestern Bell filed within three months of the time that Brooks Fiber became a qualifying facilities-based carrier in Oklahoma under subsection (A). See Brief at 15 & n.15. Accordingly, on these facts, Southwestern Bell may file under subsections (c)(1)(A) and (c)(1)(B).

Throughout all of this complexity, there is one simple constant: Once the Bell company satisfies the checklist through its agreement(s) and/or a statement, competitors no longer may prevent its entry into interLATA services. At that point, competitors can make a business decision whether to enter the local exchange. That freedom to choose — which Brooks Fiber and other competitors are now exercising in Oklahoma — was the goal of the local competition provisions of the 1996 Act and is the trigger for interLATA relief under section 271. The decisions competitors actually make are beside the point.

CONCLUSION

The Commission should deny ALTS' motion to dismiss and get on with the business of promoting competition through approval of Southwestern Bell's application for in-region interLATA relief in Oklahoma.

Respectfully submitted,

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ALTS

Association for Local Telecommunications Services

NEWS RELEASE

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ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES FILES MOTION URGING FCC TO IMMEDIATELY DISMISS SBC LONG DISTANCE BID

Competitive Local Telephone Companies Say FCC Should Rebuke SBC
-- And Warn Other Monopolies Against Spurious Long Distance Bids

WASHINGTON, D.C., APRIL 23, 1997 -- The Association for Local Telecommunications Services (ALTS), representing the nation's facilities-based competitive local telephone companies, today filed a motion urging the Federal Communications Commission to immediately reject SBC's recent bid to offer long distance service in Oklahoma, and to consider sanctioning SBC for filing a petition based on blatant misrepresentations of competitive local exchange carriers (CLECs). ALTS also urged the FCC to issue a stern warning to other incumbent Bell monopolies against further spurious long distance petitions.

Under the Telecommunications Act, incumbent monopolies that seek to offer in-region long distance must demonstrate the existence of facilities-based competition in that market, including residential service. At present, facilities-based competition in Oklahoma for any local services is miniscule, and competitive local service for residential customers is non-existent. SBC was aware at the time that it filed its Section 271 application that Brooks Fiber Properties, on which it relied for satisfying the facilities-based competition test, was not offering nor had ever offered residential service in Oklahoma. In an April 16 oral ruling, an Oklahoma Corporation Commission Administrative Law Judge (ALJ) recommended rejection of SBC's petition.

"The competitive local telephone industry wholeheartedly concurs with the Oklahoma ALJ's recommendation to deny SBC's frivolous and premature petition," said Heather Gold, ALTS president. "SBC's long distance 'trial balloon' should never have left the ground."

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